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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, vs. STEVEN CARROLL DEMOCKER, Defendant.	)	No. P1300CR20081339 Div. 6 **REPLY IN SUPPORT OF MOTION TO EXCLUDE TESTIMONY OF GREGORY COOPER PURSUANT TO ARIZONA RULE OF EVIDENCE 702**

Mr. Cooper's testimony should be excluded for the following reasons: 1) Mr. Cooper's opinions are inadmissible advice to the trier of fact about how to decide the case; 2) testimony about crime scene profiling is routinely excluded by courts; 3) Mr. Cooper's proposed testimony does not meet the *Frye* test[1]; 4) Mr. Cooper's opinions

[1] The defense also urges that the Court abandon the *Frye* test as it is not the proper test for determining admission of prosecution expert testimony in a criminal case, as explained *infra*.

have not been disclosed to the defense so his qualifications to make those opinions cannot be evaluated; and 5) Mr. Cooper's opinions violate Rule 403.[2]

Expert testimony that constitutes advice to the trier of fact on how to decide a case is inadmissible. The State's response that Mr. Cooper will testify as to "what took place at the Bridal (sic) Path residence on the night of July 2, 2008, why it happened the way it did, and why the scene was staged" is precisely the kind of advice to the trier of fact that Arizona courts routinely exclude. (State's Response at 2). This kind of testimony is not admissible under either Rule 704 or 702. "[E]xpert opinion testimony on whether the crime occurred, whether the defendant is the perpetrator, and like questions" are not admissible under Rule 702 and 704. *State v. Montijo,* 160 Ariz. 576, 774 P.2d 1366 (App. 1989) (citing *State v. Moran,* 151 Ariz. 378, 383, 728 P.2d 248, 253 (1986) (finding error under Rules 702 and 704 to admit testimony that victim's behavior and personality were consistent with the crime having occurred)). This issue often arises when an expert is opining on witness credibility and is always excluded by Arizona courts. An expert's belief in a witness's credibility "has never been a permissible subject of expert opinion lest the trial process return to the discredited notion of marshalling adherents of either side as oathtakers." *Moran,* 151 Ariz. at 383, 728 P.2d at 253, citing M. UDALL & J. LIVERMORE, LAW OF EVIDENCE § 22, at 30-31 (2d ed. 1982). As the Arizona Supreme Court in *Lindsey* concluded, "[i]t is not the expert's function, however, to substitute himself or herself for the jury and advise them with regard to the ultimate disposition of the case. Under our Constitution, not even the judge may do that." *State v. Lindsey*, 149 Ariz. 472, 720 P.2d 73 (1986) citing Ariz. Const. art. 6, § 27.

For these reasons and contrary to the State's assertions, testimony similar to that proposed to be given by Mr. Cooper is routinely excluded and should be excluded by this court. *See e.g. State v. Stevens,* 78 S.W.3d 817, 835 (Tenn.), *cert. denied,* 537 U.S. 1115,

[2] An additional motion to exclude based on the late disclosure of Mr. Cooper is also pending.

123 S.Ct. 873, 154 L.Ed.2d 790 (2003) (no error in refusing to allow F.B.I. crime analyst to testify about the probable motive of the perpetrator based on evidence at the scene of the crime); *People v. Fletcher,* 2007 WL 3072864, *20 (Cal.Ct.App.2007) (unpublished decision) (Safarik's testimony about characteristics of unidentified person he believed committed the murder did not have sufficient foundation for its admission). *See also Adams v. Amore*, 182 Ariz. 253, 255 (1994) (reversing judgment based on improper admission of expert testimony about whistleblower "profile," holding the testimony was nothing but an opinion on how the jury ought to decide the case and invaded the province of the jury).

The cases cited by the State are not to the contrary. In *State v. Swope*, 3115 Wis.2d 120, 762 N.W.2d 725 (Wis. App. 2008), the court permitted a crime scene expert to testify only as to whether the victims died simultaneously from natural causes or as the result of homicide. In *Durvardo*, cited by the State, the court excluded evidence of offender profiling similar to that offered by Mr. Cooper and only admitted testimony regarding victimology. As to that testimony, the court acknowledged "the controversial nature of crime analysis as courtroom evidence." *Duvardo v. Guirbino*, 649 F. Supp.2d 980, 996 (N.D. Cal 2009). It went on to note that the kinds of testimony it excluded and the State is offering in this case are even more controversial and not well received by courts. *Id.* "The really controversial part of crime analysis is the offender profiling part. Expert witness crime analysis has met with mixed results in court, with offender profiling being the least well-received." *Id.* (citing Malcolm Gladwell, *Dangerous Minds,* The New Yorker, Nov. 12, 2007, at 36; James Aaron George, Note, *Offender Profiling and Expert Testimony: Scientifically Valid or Glorified Results?,* 61 Vand. L.Rev. 221 (2008)). The *Duvardo* Court excluded the testimony offered by the State from Mr. Cooper related to offender profiling and crime scene analysis. The *Duvardo* court noted that, "this is not a case where a crime analyst has been allowed to profile the perpetrator

in terms of identifying for the jury the characteristics and personality traits of the offender." *Id.* at 997. The limited question in *Duvardo* was whether due process was violated by admission of victimology testimony, that is, whether "there [were] no permissible inferences that the jury may draw from the evidence" of victimology. *Id.* Because *Duvardo* arose in the context of a federal habeas, the court did not consider whether the testimony was properly admitted under state law or under the rules of evidence.

While a limited number of cases have permitted testimony on victimology, Mr. Cooper's opinions are expansive (what happened, how and why), unknown, as no report has yet been disclosed, and as explained in the State's Response, far exceed the limited nature of victimology testimony that was introduced in *Duvardo.* Further, Mr. Cooper's testimony is admissible under the Arizona Rules of Evidence 702 and 704, an issue not considered by the *Duvardo* court. *See Montijo,* 160 Ariz. 576, 774 P.2d 1366; *Moran,* 151 Ariz. 378, 383, 728 P.2d 248, 253 and discussion *infra.* Mr. Cooper's speculation about the kind of person who committed the crime to suggest that the jury draw an inference that the crime was committed by someone who knew Ms. Kennedy and who was angry is inadmissible.

Logerquist does not support admission of Mr. Cooper's testimony either. *Logerquist* dealt with expert testimony about human behavior, specifically about the existence of repressed memory. *Logerquist v. McVey*, 196 Ariz. 470, 1 P.3d 113 (2003). The *Logerquist* court held that such testimony is not subject to analysis under *Frye*.[3]

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[3] To the extent the Court finds that Mr. Cooper's opinion is of the type exempted from *Frye* by *Logerquist*, the defense urges the Court to reject *Logerquist* as wrongly decided, as other courts and commentators have vocally recognized. In dissent to the *Logerquist* opinion, Justice Martone recognized that judges play a valuable role in preventing the abuse of expert testimony and excluding junk science. *Logerquist v. McVey*, 196 Ariz. 470, 493 (2000). Similarly, dissenting Justice McGregor stated she did not think that "allowing a jury to hear unreliable, invalid "expert" evidence benefits either our judicial system or the litigants." *Id.* at 499. In commenting on *Logerquist*'s "widely asserted flaws," the Arizona Court of Appeals noted that the decision prevents a court from ever making a determination on whether the offered "inductive reasoning" based on experience, observation, or research is generally accepted by the scientific community. *Lohmeier v. Hammer*, 214 Ariz. 57, 70 (Ariz. App.

Mr. Cooper's proposed testimony however is not about human behavior but is rather about crime scene analysis and conclusions about how the crime took place, "why it happened the way it did, and why the scene was staged." (State's Response at 2). Mr. Cooper's work includes books on investigations that have "been used as college textbooks" and involves consulting with investigating agencies on "over 1,000 cases." (*Id.*) It is obvious that Mr. Cooper is not making observations on human behavior but is rather applying the scientific principles of crime scene analysis to the case at hand. The *Speer* case cited by the State is also inapposite. *State v. Speer*, 209 Ariz. 125, 98 P.3d 560 (2004). In *Speer*, the defendant offered expert testimony about interviewing techniques for child victims of sexual assault. The Court held that this was testimony about human behavior that did not require a *Frye* analysis. Unlike the testimony in *Logerquist* and *Speer*, Mr. Cooper's testimony is not limited to testimony about human behavior. Unlike the testimony at issue in *Logerquist* and *Speer*, Mr. Cooper's testimony is related to analyzing the crime scene and determining how and why the crime occurred in accordance with the principles and application of crime scene analysis. To draw expert conclusions on such issues requires more than simply making observations about human behavior and should be subject to some form of analysis by the Court.

Arizona courts have adopted the *Frye* test. *Frye* hearings are generally required in Arizona before admission of expert testimony that relies on new scientific tests or techniques. Such testimony is admissible only if "the proponent can first demonstrate that the underlying scientific principle from which the expert's deductions are made has 'gained general acceptance in the particular field in which it belongs.'" *State v. Bogan,* 183 Ariz. 506, 509, 905 P.2d 515, 518 (App.1995) (quoting *Frye,* 293 F. at 1014). The

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2006). Instead, this burden is placed upon a jury of lay men and women. *Id.* Because this task is foisted upon the jury, inefficiencies are exacerbated and there is a very real risk that jurors will be tainted by exposure to invalid scientific evidence, even if they ultimately decide to reject the evidence. *Id.* at 71, See argument infra that *Frye* is the wrong analysis for considering the admission of prosecution experts in criminal cases.

purpose of a *Frye* hearing is to resolve the issue of "general acceptance" before trial. *Id.* The *Frye* "general acceptance" requirement is more stringent than the evidentiary rules specifically applicable to receipt of expert testimony (Arizona Rules of Evidence 702 and 703) because

> [a]ny technique that in its application was likely to have an enormous effect in resolving completely a matter in controversy had to be demonstrably reliable. Where, on the other hand, an expert opinion only helped a trier to interpret the evidence or was susceptible to evaluation from the trier's own knowledge, it was received on a lesser showing of scientific reliability. Because "science" is often accepted in our society as synonymous with truth, there was a substantial risk of overweighting by the jury. The rules concerning scientific evidence appear to have been aimed at that risk.
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> Joseph M. Livermore et al., *Law of Evidence* § 702.02, at 279-80 (4th ed.2000).

The defense also urges the Court to reject the *Frye* test as it is not a constitutionally sufficient standard for reviewing the admission of prosecution experts in a criminal case. Expert scientific testimony in a criminal case must be subject to a heightened standard of reliability in order to satisfy the Due Process, Confrontation, and Eighth Amendment clauses of the United States Constitution as well as counterparts in the Arizona Constitution, Arizona Rules of Evidence, and Arizona Rules of Criminal Procedure. Criminal cases require a heightened standard of proof in general and this applies with even greater force to death penalty cases. The United States Constitution requires that "'extraordinary measures [be taken] to insure that the [accused] is afforded process that will guarantee, as much as is humanly possible, that [a sentence of death not be] imposed out of whim, passion, prejudice, or mistake.'" *Caldwell v. Mississippi,* 472 U.S. 320, 329 n.2 (1985) (*quoting Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring)). Indeed, "[t]ime and again the [Supreme] Court has condemned procedures in capital cases that might be completely acceptable in an

ordinary case." *Caspari v. Bolden*, 510 U.S. 383, 393 (1994) (quoting *Strickland v. Washington*, 466 U.S. 668, 704-705 (1984) (Brennan, J., concurring in part and dissenting in part)). *See also Kyles v. Whitley*, 514 U.S. 419, 422 (1995) (noting that the Court's "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case.") (*quoting Burger v. Kemp*, 483 U.S. 776, 785 (1987)).

Recent studies have highlighted the absolute necessity of judicial oversight in admitting scientific testimony. Brandon L. Garrett and Peter J. Neufeld undertook a study of 156 cases of exonerees in which forensic testimony was presented. Brandon L. Garret & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Virginia L. Rev. 1 (2009). The authors found that in 60% of these cases, the forensic analysts called by the prosecution provided invalid testimony. According to the study, "the adversarial process largely failed to police this invalid testimony." *Id.*

Similarly, the National Academy of Sciences was directed by Congress to undertake the study regarding the significant improvements needed in forensic science and, in 2009, released an exhaustive and fully documented report entitled "Strengthening Forensic Science in the United States: A Path Forward." Available at

. The Report details serious flaws in the scientific reliability and reporting of forensic testing and suggests sweeping reform. The Report states that "... if the scientific evidence carries a false sense of significance ... the jury or court can be misled, and this could lead to wrongful conviction or exoneration. If juries lose confidence in the reliability of forensic testimony, valid evidence might be discounted, and some innocent persons might be convicted or guilty individuals acquitted." *See id.* at 37. The Report sheds serious doubt on many common types of forensic science investigations. Across the spectrum of non-DNA forensic identification techniques, the Report identified serious issues including:

(1) Inadequate or no research regarding base rates, error rates, measurement error rates, or minimizing the risk of bias in forensic testing;

(2) Inadequate or no standards in determining a match, in forensic terminology, in report writing, and in forensic science education;

(3) The lack of mandatory certification for forensic examiners and the lack of proficient testing; and

(4) Inadequate funding.

The National Academy of Sciences Report acknowledges that unreliable forensic evidence and exaggerated forensic testimony have contributed to a significant number of wrongful convictions and decries "the potential danger of giving undue weight to evidence and testimony derived from imperfect testing an analysis." *Id.* at S-3. In light of the weaknesses inherent in many disciplines of forensic science and the grave potential for invalid testimony on the part of expert witnesses, it is imperative that the Court undertake an active role in evaluating both the type of scientific evidence and the experts who seek to present it.

An additional concern is that the defense has still not been provided with Mr. Cooper's opinions or the basis for his opinions and is therefore unable to conclude if he is qualified to reach the conclusions he draws. The defense does have serious concerns based on what little information is available on this topic at this time. The Court should order the State to disclose the requested items as outlined in the original motion within five days.

Finally, even if the Court determines that Mr. Cooper's testimony is admissible under Rule 702, his testimony should be excluded pursuant to Rule 403. The probative value of Mr. Cooper's opinions on these issues of how and why the crime occurred is substantially outweighed by the danger of unfair prejudice and confusion of the jury. Providing an "expert" gloss on speculation about how or why a crime occurred –

particularly where there is no physical evidence to support that theory – is likely to substantially prejudice Mr. DeMocker's right to receive a fair trial. This is particularly true in light of the National Academy of Science's recent report, noting that juries can be misled by scientific evidence with a false sense of significance. "Strengthening Forensic Science in the United States: A Path Forward." http://www.nap.edu/catalog/12589.html.

CONCLUSION

Defendant Steven DeMocker, by and through counsel, hereby requests that this Court prohibit the State from offering testimony from Gregory Cooper.

DATED this 25th day of March, 2010.

By: _____

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